

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILLIP B. SOE and DEPARTMENT OF THE NAVY,
NAVAL AIR REWORK FACILITY, Alameda, CA

*Docket No. 99-1449; Submitted on the Record;
Issued September 12, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On April 17, 1979 appellant, then a 50-year-old repairman, filed a traumatic injury claim (Form CA-1) alleging that on that date he received a blow to the head when the front gear collapsed and the aircraft fell forward.

On November 8, 1982 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of disability on March 12, August 19 and December 26, 1981.

By decision dated November 14, 1983, the Office denied appellant's claims on the grounds that he failed to submit factual evidence supportive of his claims.

In a December 1, 1983 decision, the Office found that appellant had failed to submit factual and medical evidence sufficient to establish that he sustained an injury on April 17, 1979. In a letter dated December 17, 1983, appellant requested an oral hearing before an Office representative.

By decision dated October 15, 1984, the Office hearing representative accepted that appellant sustained a minor head contusion and superficial scalp laceration on April 17, 1979. The hearing representative, however, found the evidence of record insufficient to establish that appellant's condition and/or disability for work after April 20, 1979 was causally related to the April 17, 1979 employment injury. In a February 22, 1985 letter, appellant requested

reconsideration of the Office's decision. On July 29, 1985 appellant appealed the Office's decision to the Board.

On October 15, 1985 the Office filed a motion to remand the case. The Office requested that the Board set aside the October 15, 1984 decision and remand the case for reconsideration pursuant to 5 U.S.C. § 8128(a) and to issue a *de novo* decision acting upon appellant's February 22, 1985 request for reconsideration.

On November 27, 1985 the Board granted the Office's motion to remand the case.

In a February 6, 1986 decision, the Office found the medical evidence of record insufficient to establish that appellant's condition after April 20, 1979 was caused by the April 17, 1979 employment injury. By letter dated July 25, 1987, appellant requested an oral hearing.

In a November 12, 1987 decision, the Office denied appellant's request for a hearing as untimely filed pursuant to section 8124 of the Federal Employees' Compensation Act. By letter dated November 6, 1987, which was received by the Office on November 18, 1987, appellant requested reconsideration of the Office's decision.

By decision dated February 17, 1988, the Office vacated the February 6, 1986 decision and remanded the case for further development. The Office found the medical evidence submitted by appellant in support of his request for reconsideration sufficient to refer the case to an Office medical adviser to determine whether there was a causal relationship between the April 17, 1979 employment injury and appellant's current conditions.

On remand the Office found a conflict in the medical opinion evidence between the Office medical adviser and appellant's treating physician regarding a causal relationship between his current conditions and his April 17, 1979 employment injury. The Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. Allan Halden, a Board-certified orthopedic surgeon, and Dr. John Mark Friedberg, a Board-certified psychiatrist and neurologist, for an impartial medical examination.

By decision dated June 14, 1989, the Office found the medical evidence of record insufficient to establish that appellant's conditions were related to his April 17, 1979 employment injury based on the medical opinions of Dr. Halden and Dr. Friedberg. In a June 23, 1989 letter, appellant appealed the Office's decision to the Board.

In a December 21, 1989 decision, the Board affirmed the Office's June 14, 1989 decision. By letter dated May 9, 1990, appellant requested reconsideration of the Office's June 14, 1989 decision.

By decision dated June 1, 1990, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the medical evidence submitted did not constitute new evidence which required reopening its prior decision.

By letter dated December 12, 1990, appellant requested that the Office reconsider his claim.

By decision dated January 15, 1991, the Office denied appellant's request for reconsideration without a review of the merits of the claim on the grounds that the evidence submitted was insufficient to reopen the claim and that appellant's request was filed more than one year from the Office's June 14, 1989 decision. In a March 16, 1991 letter, appellant appealed the Office's decision to the Board.

By decision dated May 18, 1992, the Board affirmed the Office's June 1, 1990 decision, but set aside the Office's January 15, 1991 decision and remanded the case for consideration of appellant's timely request for reconsideration. Following the Board's decision, appellant filed a petition for reconsideration with the Board on May 21, 1992.

In a June 26, 1992 decision, the Office denied modification of its prior decisions. In an accompanying memorandum, the Office found appellant's December 12, 1990 request for reconsideration timely filed, but found the medical evidence submitted in support of appellant's request for reconsideration insufficient to establish that appellant had a condition caused by his April 17, 1979 employment injury.

In an August 14, 1992 order, the Board denied appellant's May 21, 1992 petition for reconsideration.¹

In a September 25, 1992 letter, appellant requested an oral hearing before an Office representative.

In a December 21, 1992 letter, the Office advised appellant that he was not entitled to a hearing as noted in an accompanying copy of the appeal rights that were attached to its June 26, 1992 decision. The Office also advised appellant that he had already exercised this appeal right.

In an April 12, 1993 letter, appellant appealed the Office's June 26, 1992 decision to the Board. On July 26, 1993 the Office filed a motion to dismiss appellant's appeal on the grounds that the Office did not have jurisdiction to issue its June 26, 1992 decision because it was issued before the Board ruled on appellant's petition for reconsideration on August 14, 1992.

On August 11, 1993 the Board issued an order dismissing appellant's appeal.

By decision dated September 1, 1993, the Office denied modification of its prior decisions on the grounds that the medical evidence submitted was insufficient to establish that appellant's current condition was caused by the April 17, 1979 employment injury. In a September 7, 1993 letter, appellant appealed the Office's decision to the Board.

¹ By letter dated August 7, 1992, that was received by the Board on September 25, 1992, appellant appealed the Board's August 14, 1992 decision. In an August 24, 1992 letter, the Board advised the Office that appellant was told that his appeal could not be docketed because there appeared to be no final decision issued by the Office.

In a June 26, 1995 decision, the Board affirmed the Office's September 7, 1993 decision. On June 30, 1995 appellant filed a petition for reconsideration with the Board. On September 19, 1995 the Board denied appellant's petition for reconsideration.

In a February 9, 1996 letter, appellant requested reconsideration of the Office's June 14, 1989 and September 1, 1993 decisions.

By decision dated May 1, 1996, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence submitted was either cumulative, irrelevant or immaterial, and thus, insufficient to warrant review of the prior decision. On May 28, 1996 appellant appealed the Office's decision to the Board.

On June 9, 1998 the Board affirmed the Office's May 1, 1996 decision.

In an August 6, 1998 letter, appellant requested reconsideration of the Office's May 1, 1996 decision.

By decision dated September 9, 1998, the Office denied appellant's request for reconsideration without a review of the merits of the claim on the grounds that appellant's request neither raised substantive legal questions nor included new and relevant evidence, and thus, it was insufficient to warrant review of the prior decision.²

The only decision before the Board on this appeal is the September 9, 1998 Office decision which denied appellant's request for reconsideration on the grounds that appellant had failed to submit evidence sufficient to warrant review of its prior decision.³

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁴ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without review of the merits of the claim.⁵

In the present case, appellant failed to show that the Office erroneously applied or interpreted a point of law or fact not previously considered by the Office; neither did he advance a point of law not previously considered by the Office. In his August 6, 1998 letter, appellant

² In its September 9, 1998 decision, the Office stated that the appeal rights which accompanied the May 1, 1996 decision did not provide reconsideration appeal rights, rather, it only gave appeal rights before the Board, which appellant had already exercised.

³ See 20 C.F.R. § 501.3(d)(2).

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

merely requested reconsideration of the Office's May 1, 1996 decision no additional evidence was submitted. Appellant did not submit relevant and pertinent evidence not previously considered by the Office. The issue in this case, whether appellant's current conditions were caused by his April 17, 1979 employment injury, is medical in nature; however, appellant did not submit any new medical evidence with his request for reconsideration.

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The September 9, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
September 12, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member